BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN K. GRISHAM	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,013,323
TRI STATE BUILDING SUPPLY COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
BUILDERS' ASSOCIATION SELF-INSURERS' FUND OF KANSAS	)	
Insurance Fund	)	

ORDER

Respondent and its insurance fund appealed the July 12, 2006, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

Claimant injured his back on September 29, 2003, working for respondent. Respondent and its insurance fund admit they are responsible for the resulting herniated disc between the first and second lumbar (L1-L2) vertebrae. But they challenge whether claimant's present need for medical treatment for spinal stenosis below L1-L2 is related to the September 2003 accident.

On July 12, 2006, the parties appeared before Judge Hursh for the third preliminary hearing held in this claim. After considering the evidence presented, the Judge entered the July 12, 2006, Order in which the Judge rejected respondent and its insurance fund's argument but, instead, ordered them to provide claimant with medical treatment for his ongoing low back and leg symptoms. The Judge reasoned, in part:

> There is no dispute the claimant suffered a work related low back injury on September 29, 2003. The respondent provided treatment initially with Dr. Yost, who performed laminectomy surgery for a herniated disk at L1-L2. An MRI done shortly after the accident revealed the L1-L2 herniation, as well as degenerative changes at L3-L4 and L4-L5. The surgery relieved the intense back and leg pain that the claimant experienced following the accident, but the claimant continued to have

> occasional leg pain and cramping, and this residual pain has gotten worse over time since the surgery
>
> Treatment was transferred to Dr. Ciccarelli, and then, pursuant to the November 7, 2005 order, to Dr. Griffitt. Both Dr. Ciccarelli and Dr. Griffitt opined that the claimant's continued symptoms are due to spinal stenosis at L3-L4 and L4-L5, a condition that they feel is distinct from [the] sole work related injury, the herniation at L1-L2, which has already been treated. Dr. Griffitt did recommend epidural steroid injections for the stenosis problem, but because of his causation opinion, the respondent and insurance fund did not provide the treatment. The claimant produced a report from Dr. Stuckmeyer that said the claimant's L3-L4 and L4-L5 condition was aggravated by the original work injury.
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> There was no evidence of low back or lower extremity symptoms prior to the September 29, 2003 injury. The claimant suffered severe low back and lower extremity symptoms after that event, and those symptoms have continued to a lesser degree since the surgery. The respondent's duty is to provide reasonable and necessary medical treatment to cure and relieve the effects of the injury. In this case, the effects of the injury are low back and lower extremity symptoms. The court does not see adequate reasoning for the fine distinction between L1-L2 being work related and L3-L4/L4-L5 not being work related. This was the thought behind the court's November 7, 2005 order, but apparently that was not made clear.[1]

Respondent and its insurance fund contend Judge Hursh erred. They argue the evidence establishes that claimant's present complaints are not the result of his initial injury and do not arise out of his September 2003 accident. Accordingly, respondent and its insurance fund request the Board to deny claimant's request for additional medical treatment.

Conversely, claimant argues the Board should dismiss this appeal as the Board lacks jurisdiction at this juncture of the claim to address claimant's request for medical treatment. In the alternative, claimant requests the Board to affirm the July 12, 2006, Order as there is overwhelming evidence the September 2003 accident aggravated the underlying degenerative condition in claimant's low back that now requires medical treatment.

The only issues before the Board on this appeal are:

1. Does the Board have jurisdiction to review the Judge's preliminary hearing finding that claimant's present need for medical treatment is related to his September 2003 accident at work?

[1] ALJ Order (July 12, 2006) at 1-2.

2. If so, does the evidence establish that fact?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board concludes the July 12, 2006, Order should be affirmed.

The parties agree claimant injured his low back on September 29, 2003, while bending over to get a clock. The parties also agree claimant's accident and his resulting injuries arose out of and in the course of his employment with respondent.

Shortly after the injury, Dr. John G. Yost, Jr., operated on claimant's low back. The doctor's operative report raises some questions as to which levels the doctor operated. But it is undisputed the doctor diagnosed a herniated disc at L1-L2 and on October 2, 2003, performed a discectomy at that level. And other notes from Dr. Yost's clinic indicate claimant also had hemilaminotomies from the tenth thoracic through the second lumbar vertebrae (T10 through L2).

Despite continuing low back and left leg symptoms, Dr. Yost released claimant from treatment in March 2004. Those symptoms progressively worsened and claimant sought additional medical treatment with his personal physician, Dr. Jacqueline S. Orender, who recommended restarting physical therapy and a specialist for possible steroid injections.

Respondent and its insurance fund referred claimant to Dr. John M. Ciccarelli. The doctor first saw claimant in January 2005 and initially believed claimant may have had a herniated disc at L3-L4, which had not been addressed. Consequently, the doctor had claimant undergo an MRI after which Dr. Ciccarelli concluded claimant had degenerative changes in his spine that were not directly related to his incident at work. The January 26, 2005, MRI report that was introduced into the preliminary hearing record indicates claimant had small herniated discs at the L2-L3, L3-L4, and L4-L5 levels, which caused a moderate amount of acquired spinal stenosis at the first two levels.

In January 2006, claimant saw Dr. Wesley E. Griffitt at respondent and its insurance fund's request to determine if claimant needed additional medical care for his September 2003 accident at work. The doctor concluded claimant had recovered from his L1-L2 discectomy and that his present symptoms were due to lumbar stenosis, which was not related to the incident at work. Moreover, the doctor indicated lumbar epidural injections might be helpful and that claimant might eventually require decompressive lumbar surgery.

To counter the opinions from Dr. Ciccarelli and Dr. Griffitt, claimant was evaluated by Dr. James A. Stuckmeyer. Dr. Stuckmeyer, who examined claimant in May 2006, agreed with the other doctors' diagnosis of spinal stenosis. But based upon claimant's

history and a review of his medical records, which reflect persistent symptoms following his October 2003 back surgery, the doctor concluded claimant's preexisting degenerative condition in his low back (L3 through L5) was aggravated by the September 2003 accident at work.

Considering claimant's testimony, along with the medical records introduced into the preliminary hearing record, at this juncture the Board is persuaded by Dr. Stuckmeyer's opinions. Claimant did not have symptoms before the September 2003 accident but he has had ongoing symptoms since that accident. Although it is true the September 2003 accident did not cause the underlying degenerative condition, the accident appears to have aggravated it and made it symptomatic. Accordingly, the Board concludes claimant's September 2003 accident at work aggravated the preexisting degenerative condition in claimant's low back and, therefore, claimant's present need for medical treatment is related to his work-related accident. Moreover, the Board adopts the findings and conclusions set forth by the Judge.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[2] The test is not whether the job-related activity or injury caused the condition, but whether the job-related activity or injury aggravated or accelerated the condition.[3]

Claimant questions the jurisdiction of the Board to review the preliminary hearing finding that claimant's present need for medical treatment arose out of his September 2003 accident. The issues of whether an injury or particular medical treatment is related to a compensable work-related accident are preliminary hearing issues that the Board is empowered to review as those issues go to compensability as only those injuries that arise out of and in the course of employment are compensated under the Workers Compensation Act. Accordingly, K.S.A. 44-534a gives the Board jurisdiction to review the July 12, 2006, Order.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but, instead, those findings may be modified upon a full hearing of the claim.[4]

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[2] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[3] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

[4] K.S.A. 44-534a.

WHEREFORE, the Board affirms the July 12, 2006, Order entered by Judge Hursh.

IT IS SO ORDERED.

Dated this ____ day of September, 2006.

BOARD MEMBER

c: Timothy E. Power, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Fund